

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

BRENDA TOLBERT, ET AL.

Plaintiff

v.

RBC CAPITAL MARKETS  
CORPORATION n/k/a RBC CAPITAL  
MARKETS, LLC, ET AL.,

Defendants.

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No. 4:11-CV-107

Judge Keith P. Ellison

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF  
THEIR MOTION FOR SUMMARY JUDGMENT**

Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment argues, *inter alia*, that plaintiffs' fiduciary breach claims with respect to the pre-2009 plan years are barred by ERISA's six-year statute of repose, codified at 29 U.S.C. § 1113(1)(A). (Dkt. No. 91 at 42-45.) In support, defendants cited a number of cases holding that § 1113(1)(A) does not permit application of a "continuing violation" theory for ERISA fiduciary breach claims, including the district courts' decisions in *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074 (C.D. Cal. 2009) and *David v. Alphin*, 2011 WL 4402759 (W.D.N.C. Sept. 22, 2011). (Dkt. No. 91 at 43 n.16.) Both *Tibble* and *David* were recently affirmed by the United States Courts of Appeals for the Ninth and Fourth Circuits, respectively. *Tibble v. Edison Int'l*, No. 10-56406, Dkt. No. 82-1, Slip Opinion (9th Cir. Mar. 21, 2013) (attached as Exhibit A); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (attached as Exhibit B). Defendants respectfully submit these two decisions as supplemental authority in support of the timeliness arguments found on pages 42-45 of their summary judgment brief. (Dkt. No. 91.)

In both cases, the courts of appeals addressed fiduciary breach claims based on the alleged imprudent decision to include certain investment options in a benefit plan. And in both cases the courts held that the plaintiffs' claims were barred by the six-year repose period prescribed in 29 U.S.C. § 1113(1)(A), reasoning that the initial decision to include the investments in the plan occurred more than six years before plaintiffs filed their complaint. As the *Tibble* court explained, permitting a "continuing violation theory" to avoid dismissal under § 1113(1)(A), "would make a hash out of ERISA's limitation period and lead to an unworkable result." Slip Opinion at 10. Thus, in both cases, the courts held that, absent evidence of a *new* breach triggering a *new* limitations period, plaintiffs' claims were time-barred. *See id.* at 11 (plaintiffs' "logic confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period" (quotations omitted)); *David*, 704 F.3d at 341-43 (similar).

Likewise, here, plaintiffs have expressly alleged that the alleged fiduciary defendants violated their fiduciary duties by, at all times since 2002, operating the WAP in violation of ERISA's vesting (and other) requirements. Plaintiffs have never attempted to identify any independent breach occurring thereafter. Accordingly, consistent with the recent Circuit Court decisions in *Tibble* and *David*, plaintiffs' claims with respect to the pre-2009 plan years are barred by the six-year repose period prescribed in 29 U.S.C. § 1113(1)(A).

Dated: March 22, 2013

Respectfully submitted,

RBC Capital Markets Corporation; RBC Capital Markets, LLC; RBC Centura Bank; and RBC U.S. Insurance Services, Inc.

by: s/ Christopher J. Boran

Sari M. Alamuddin (*admitted pro hac vice*)  
Ill. State Bar No. 6215689  
Christopher J. Boran (*admitted pro hac vice*)  
Ill. State Bar No. 6282552  
MORGAN, LEWIS & BOCKIUS LLP  
77 West Wacker Drive, Fifth Floor  
Chicago, Illinois 60601  
312.324.1000 (Telephone)  
312.323.1001 (Facsimile)

Alison J. Gates  
TX State Bar No.24055535  
Federal ID No. 706309  
MORGAN, LEWIS & BOCKIUS LLP  
1000 Louisiana, Suite 4200  
Houston, Texas 77002  
713.890.5157 (Telephone)  
713.890.5001 (Facsimile)

*Attorneys for Defendants*

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendants' Notice of Supplemental Authority in Support of Their Motion for Summary Judgment was served via the Court's Electronic Case Filing system on March 22, 2013, on plaintiffs' counsel:

Mr. Geoffrey H. Bracken  
Gardere Wynne Sewell LLP  
1000 Louisiana, Suite 3400  
Houston, Texas 77002-5007

Mr. William G. Whitehill  
Mr. Joe B. Harrison  
1601 Elm Street, Suite 3000  
Dallas, Texas 75201

s/ Christopher J. Boran